

STATE OF MICHIGAN  
SUPREME COURT

PINE OAKS, L.L.C., a limited,  
liability company,

Plaintiff/Appellant,

v

<sup>and</sup>  
DANNY DEVRIES & JAYNE DEVRIES,

Defendants/Appellee.

Supreme Court No.

Court of Appeals No. 249163 *Open 12/9/04*

Ottawa County Circuit Court

Case No. ~~02-44620-CH~~ *03-45297-AV*

*E. Post*  
District Court Case No. HU-02-2650-LT

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**PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL**

**FILED**

JAN 20 2005

CORBIN S. LEE  
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MICHIGAN SUPREME COURT

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### **JUDGMENT APPEALED FROM**

Plaintiff seeks leave to appeal from the decision of the Court of Appeals, dated December 9, 2004 and attached as Exhibit 10. The Court of Appeals set aside the judgment entered by the 58th District Court and the decision of the 20th Circuit Court (for Ottawa County) affirming the District Court judgment. The Court of Appeals ordered a new trial.

Plaintiff seeks to reverse the decision of the Court of Appeals and reinstate the judgment entered by the 58th District Court.

## QUESTIONS TO BE PRESENTED FOR REVIEW

### **1. May summary proceedings be used to evict an occupant of property after a mortgage foreclosure proceeding?**

This issue was not raised below but Plaintiff submits that the answer is:	Yes
This issue was not raised by the Defendants.	
This issue was not addressed by the District Court.	
This issue was not addressed by the Circuit Court on appeal.	
The Court of Appeals answered:	No

### **2. May Defendants challenge a mortgage foreclosure in summary proceedings based on matters outside of the statutory foreclosure record?**

The Plaintiff answers:	No
The Defendants answer:	Yes
The District Court answered:	No
The Circuit Court answered:	No
The Court of Appeals answered:	Yes

### **3. May the Defendants challenge a mortgage foreclosure sale in summary proceedings based on the mortgage holder's alleged failure to issue a contractual notice of breach?**

The Plaintiff answers:	No
The Defendants answer:	Yes
The District Court answered:	No
The Circuit Court answered:	No
The Court of Appeals answered:	Yes

### **4. Must mortgagor's assignee/grantee's name be listed in a notice of sale even though not required by MCL 600.3212?**

The Plaintiff answers:	No
The Defendants answer:	Yes
The District Court answered:	No
The Circuit Court answered:	No
The Court of Appeals answered:	Yes

**5. May the Defendants challenge a mortgage foreclosure sale based on the failure of the Defendant's agent to properly redeem the property from foreclosure?**

The Plaintiff answers:	No
The Defendants answer:	Yes
The District Court answered:	No
The Circuit Court answered:	No
The Court of Appeals answered:	Yes

**6. May the Defendants challenge mortgage foreclosure proceedings based on alleged irregularities that do not negatively impact the Defendant?**

The Plaintiff answers:	Yes
The Defendants answer:	No
The District Court answered:	Yes
The Circuit Court answered:	Yes
The Court of Appeals did not answer this issue	

## STATEMENT OF MATERIAL PROCEEDINGS BELOW

These proceedings are the aftermath of a statutory mortgage foreclosure by advertisement in which Plaintiff was the successful purchaser of the property and the Defendants failed to redeem. These proceedings were commenced pursuant to **MCL 600.5714 (1)(f)**. The statute provides that:

“A person entitled to premises may recover possession of the premises by summary proceedings in the following circumstances:

(f) When a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises.”

The factual background in this matter is rather simple, and to a large extent, undisputed.

Mr. Jack Poll purchased the property known as 7781 Hearthway in Georgetown Township in Ottawa County by warranty deed. (Trial Exhibit 1). He financed the purchase by granting a mortgage to Grand Rapids Mutual Federal Savings and Loan Association. (Trial Exhibit 2). Jack Poll is the sole mortgagor in the mortgage.

A few years later, Mr. Poll sold the property to the Defendants, Mr. & Mrs. DeVries, by deed. Mr. & Mrs. DeVries agreed with Mr. Poll to perform his mortgage obligations. (Trial Exhibit 3). Further, the name of the mortgage holder, Grand Rapids Mutual Federal Savings and Loan Association, changed through mergers and acquisitions that ultimately formed Comerica Bank. (Trial Exhibit 6). Comerica Bank used Washington Mutual as its agent to service the mortgage but never assigned the mortgage.

During 2000 and 2001, the Defendants fell behind on their mortgage payments. In 2001, the situation became serious enough that Comerica Bank decided to foreclose. It published notice in a local newspaper as set forth in the affidavit recorded as page 2 of the Sheriff's Deed



(Trial Exhibit 4). Notice of the foreclosure sale was posted on the property as required by statute as set forth in the affidavit on page 3 of the Sheriff's Deed.

Despite this affidavit of posting, the Defendants asserted in their Answer that the Notice of Sale was not posted. Thus, Plaintiff subpoenaed the Court Officer who posted the notice. He testified that he posted the Notice of Sale at the property, that the Defendant Mr. DeVries was present at the time the notice was posted, that he discussed the foreclosure with Defendant Mr. DeVries. The Court Officer showed a picture that he took of the posted notice on the property with Mr. DeVries in the photograph. Once confronted with this information, Mr. DeVries admitted that the notice was posted.

The Sheriff Deputy conducted the foreclosure sale on August 23, 2001: at the date, time and place stated in the published and posted Notice of Sale. At the foreclosure sale, Plaintiff submitted the high bid and the Deputy Sheriff executed a Sheriff's Deed in favor of Plaintiff. (Trial Exhibit 4). The Deputy Sheriff turned the proceeds over to Comerica Bank's representatives in satisfaction of the mortgage and Comerica Bank issued a certificate of discharge. (Trial Exhibit 5).

The redemption period expired without redemption. The Register of Deeds then marked the Sheriff's Deed "operative 8-23-02" and delivered the original to Plaintiff<sup>1</sup> as required by **MCL 600.3236**.

At trial Mr. & Mrs. DeVries presented no evidence they had the ability to cure the mortgage loan default.<sup>2</sup> They made no effort to contact Comerica Bank, Washington Mutual or

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<sup>1</sup> Plaintiff was the high bidder at the foreclosure sale. Plaintiff has no connection to Comerica Bank or Washington Mutual. Plaintiff is merely a Michigan limited liability company (Trial Exhibit 7) set up by an individual to submit bids at foreclosure sales.

<sup>2</sup> Defendants presented no evidence on these factual issues at trial. In fact, during depositions in a separate Circuit Court proceeding, they testified that they did not have the ability to cure the mortgage default during July/August 2001. See attached Exhibit 10.

the banks foreclosure attorneys. Instead, they sought out an independent third-party mortgage company and executed documents with that company in late August or early September in efforts to refinance.

Neither the Defendants nor their independent third-party mortgage company ever attempted to tender the redemption amount to the Plaintiff or the Register of Deeds. Further, there is no evidence (and neither party argued) that the third-party mortgage company (Enterprise Mortgage) had any connections as an affiliate of Plaintiff, Comerica Bank or Washington Mutual.

The only disputed fact at trial was whether Comerica Bank gave a 30 day notice of breach of the mortgage. The mortgage required that the bank give a 30 day notice of breach. Defendants assert that the notice was not given.<sup>3</sup> The District Court ruled that this was not an issue for the summary proceedings because the contractual notice of breach is not part of the statutory foreclosure record.

After a jury verdict for Plaintiff, the District Court entered a judgment awarding possession of Plaintiff. The Circuit Court affirmed this judgment on appeal. The Court of Appeals granted leave to appeal and reversed the judgment.

The Court of Appeals made several errors in its opinion. Its opinion conflicts with prior authority from this Court and prior published opinions by the Court of Appeals. The Court of Appeals' Opinion conflicts with the statutes regulating foreclosures by advertisement, disrupts the foreclosure process and fails to give guidance to the parties and the District Court for a new trial.

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<sup>3</sup> In separate proceedings, Washington Mutual asserts that they gave the notice on behalf of Comerica Bank.

## ARGUMENT

### I. Introduction

The Court of Appeals' failed to abide by prior case law and the statutes governing foreclosures by advertisement. The Court of Appeals was intent on ordering a new trial merely because of the low purchase price at the foreclosure sale. In fact, a low purchase price benefits a property owner in that the amount necessary for redemption was very low and more easily obtainable.

This case presents substantial questions of statewide significance to the jurisprudence of the state. The Legislature has authorized foreclosure by advertisement by statute to provide a quick inexpensive means to foreclose mortgage at public sales. Many mortgage foreclosures sales take place each week around the state (most of the larger counties conduct foreclosures weekly).

Third parties purchasing at foreclosure sales, and subsequent purchasers, need settled and objective standards for evaluating foreclosure proceedings to know that they are not wasting they money bidding at sales. Purchasers must be able to determine whether the mortgage holder complied with the foreclosure requirements from publicly available records. Private credit information and notices between the mortgage holder and property owner are not disclosable.

The Court of Appeals' decision conflicts with prior case law and the foreclosure statutes which provide settled and objective foreclosure standards. The Court of Appeals' decision:

- (a) allows property owners to challenge foreclosure proceedings *after* the sale and *after* the redemption period expires based on information not available at the foreclosure sale (ie, private credit information);
- (b) extends redemption periods when the property owner failed to comply with the simple statutory requirements for redemption for virtually any reason (even the Defendants' subjective and erroneous belief that their agent redeemed); and

(c) declares (as a matter of law) that purchasers at a foreclosure sale must assume that the proceedings are defective if the purchase price (i.e., the balance owed on the mortgage and the foreclosure costs) are well below the property's potential value.

All of these approaches are contrary to prior published case law from this Court and the Court of Appeals.

Given the number of foreclosures that take place weekly around the state and the fact that the Defendants have requested that the Court of Appeals' opinion be published<sup>4</sup>, these issues have major significance to the law of the state. As such, protecting the long standing objective rules by open ended subjective rules adopted by the Court of Appeals is of significance to the state and should be addressed by this Court.

It was not until this case that the appellate courts have allowed a challenge to a third party purchaser's foreclosure deed based pre-foreclosure allegations or failure of the property owner's agent.

**I. The Court of Appeals erroneously ruled that summary proceedings cannot be used to evict the Defendants after a mortgage foreclosure.**

The Legislature provides by statute that summary proceedings can be used to remove persons in possession of property after a mortgage foreclosure proceedings. In **MCL 600.5714 (1) (f)**, the statute provides that:

“A person entitled to premises may recover possession of the premises by summary proceedings in the following circumstances:

(f) When a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises.”

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<sup>4</sup> Further, even unpublished opinions are regularly circulated and used in the lower courts given the computer research services that make unpublished opinions readily available as does the State Bar of Michigan's E-Journal.

This process has been acknowledged by case law. *Gage v. Sanborn*, 106 Mich. 269 (1895); *Shelby Co. v. Dickinson*, 259 Mich. 197 (1932).

The Court of Appeals failed to understand the foreclosure process by ruling that these proceedings cannot be used to evict the Defendants. The Court of Appeals, at page 5 of its opinion, quoted the Michigan Court Rules Practice stating that summary proceedings may not be used to adjudicate claims of third parties whose interest in the property was not foreclosed out.

The Court of Appeals, at page 6, indicates that Comerica Bank did not commence foreclosure against the Defendants, but against Mr. Poll. Thus, the Court of Appeals erroneously ruled that Defendants' rights to the property were not foreclosed out.

In reaching this conclusion, the Court of Appeals' decision is contrary to **MCL 600.3236** and prior case-law such as *Board of Trustees of General Retirement System of the City of Detroit v RenCen Indoor Tennis & Racquet Club*, 145 Mich.App. 318 1985). Foreclosure proceedings are in rem proceedings taken against the property and are not commenced against persons. Mr. Poll's name is in the notice because the statute required the mortgagor's name be stated in the notice. **MCL 600.3212**. The Sheriff's Deed conveys to Plaintiff all title held by Mr. Poll as of the date of the mortgage (April 18, 1978). **MCL 600.3236**. Mr. & Mrs. DeVries received a deed from Mr. Poll in 1979 (after the mortgage). Mr. & Mrs. DeVries' claim of title was not a competing claim of title. Their claim of title derives entirely from Mr. Poll, the same person who granted the mortgage to Comerica Bank. Thus, the sale foreclosed out Defendants' interest in the property.<sup>5</sup>

The Court of Appeals' error can also be understood by looking at its quote on page 5 from Longhofer & McKenna, [Michigan Court Rules Practice] section 3411.13. The authors indicate

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<sup>5</sup> **MCL 600.3236** provides that foreclosure sales foreclose out interests created by the mortgagor after the mortgage but does not foreclosure out interests created prior to the mortgage.

that summary proceedings cannot be used “if the defendant claims a right to possession by virtue of his own superior title or under the adverse title of the third person...”

This rule of law was applied by the Court of Appeals in *Vaughan v Thomas*, 2004 WL1532317 (Mich.App.) (Mich.App., 2004).<sup>6</sup> (Exhibit 12). In that case, the Court noted that the defendant Thomas previously commenced an action to determine his title to certain property. That action was commenced against a Mr. Gratwick and all those claiming through him. The Court of Appeals in that case correctly noted that the prior action by Defendant Thomas was only binding upon the Gratwick defendants and is not binding on non-parties (ie, persons claiming title that was not derived through Gratwick).

In other words, should a defendant in summary proceedings assert a title derived from a third party (as the Plaintiffs did in *Vaughan*) or assert title through adverse possession or similar means other than through the mortgagor, such titles are not foreclosed out by a foreclosure by advertisement. Such third party title claims cannot be adjudicated in summary proceedings.

In the present case, both Plaintiff and Defendants DeVries claimed title through Jack Poll. The foreclosure sale foreclosed out the interest of Jack Poll and those claiming through him after the date of the mortgage. The foreclosure does not foreclose out the interests of those dating back before the mortgagor from third parties. **MCL 600.3236; *Board of Trustees of General Retirement System of City of Detroit v. Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich.App. 318 (1985).** Since Defendant's DeVries' claim of ownership is derived from the mortgagor after the mortgage, it was foreclosed out.

The Court of Appeals probably went astray in this matter because this issue was not raised or argued by the parties or the lower courts and is contrary to **MCL 600.3236**.

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<sup>6</sup> The *Vaughan* opinion was released in July 2004. Judge Neff was on both panels.

This issue is a major significance to the law of the state because of the substantial number of foreclosure actions commenced and the need for summary proceedings to evict persons continuing in possession after foreclosure. Thus, this Court should grant leave to appeal to correct the misinterpretation of the Court of Appeals' decision.

**II. The Court of Appeals' decision conflicts with prior case law from this Court by defenses based on matters outside the statutory foreclosure record in summary proceedings.**

The Court of Appeals disregarded this Court's prior decisions that held that a defendant in summary proceedings may not raise defenses based on matters outside the statutory foreclosure record, blurring the general grant of District Court jurisdiction with the types of defenses available to challenge a foreclosure.

However, the Court of Appeals has ruled in this case that the defendant may raise any defenses that might be applicable to apply. For example, the Court of Appeals, at page 6 of its opinion, indicates that "there was evidence to support defendants' claim that they believe the home to be redeemed following their refinancing." In other words, the Court of Appeals' opinion suggests that if they defendant believes the home is redeemed, defendants can raise this belief to thwart the summary proceedings. With such a subject of any rational standards, there can be no certainty to land titles after a foreclosure.

The Court of Appeals decision is the direct opposite of this Courts decisions in ***Reid*** and ***Gage***. In ***Reid v. Rylander, 270 Mich. 263, 267; 258 NW 630 (1935)***, this Court dealt with the aftermath of a foreclosure by advertisement and instructs us as follows:

"We again hold that *validity of the sale may be tested* in a summary proceedings based thereon, *insofar as invalidity thereof appears in the procedure*, but underlying equities, if any, bearing on the instrument, legal capacity of the mortgagee or trustee, and other matters, wholly de hors the record, inclusive of an

accounting to determine the amount due, cannot be made triable issues in a summary proceeding.

"The burden was on plaintiff to establish his right to possession, and is required evidence of *compliance with every statutory provision* relative to foreclosure by advertisement." **270 Mich. at 267.** (Emphasis supplied)

The *Reid* opinion has been cited on various occasions. It was cited as the controlling authority in *Manufacturers Hanover Mortgage Corporation v Snell*, **142 Mich. App. 548, (1985)** and later in *Zachary v Emmer*, **1996 WL 33349354, \*2 (Mich.App.) (Mich.App.,1996)** where the Court of Appeals stated that:

"when the mortgagor challenges the foreclosure sale in this manner [i.e., in summary proceedings] the mortgagors' defenses are limited to the defenses that can be raised in the eviction proceedings... *Challenges by the mortgagor* in the summary eviction proceedings appear to be limited to the *validity of the foreclosure sale procedures* while other "underlying equities" may not be raised in the eviction proceedings." *Zachary, page 6.* (Emphasis supplied) (Attached as Exhibit 13).

This Court addressed the same issue in *Gage v Sanborn*, **106 Mich. 269 (1895)** when it distinguished its prior holding in *Riggs v Sterling*, **51 Mich. 157 (1883)**. In *Riggs*, the Court did not allow the defendants to challenge the validity of a sale based on violation of their homestead rights. *Gage* distinguished *Riggs*, stating that:

"These cases [*Riggs* and another case] do not attack the *regularity of the proceedings themselves*, but raised a question *dependent upon extrinsic facts*, constituting a legal defense in a proper tribunal, viz., and adverse claim of a title, to the levy..." **106 Mich. at 278.** (Emphasis supplied)

Thus, challenges based on the statutory procedures are allowed. Challenges based on extrinsic matters like an accounting, issues over a default or other contractual matters requiring evidence extrinsic to the statutory record are not allowed. *Reid* refers to "insofar as invalidity thereof appears *in the procedure*" and requires proof of compliance with "every *statutory*



provision relative to foreclosure”, **Gage** refers to the “regularity of the proceedings themselves” and **Zachary** refers to the “validity of the foreclosure sale procedures...”<sup>7</sup>

Examples of matters extrinsic to, or de hors, the record of the foreclosure proceedings were described in **Reid**:

1. Underlying equities bearing on the instrument (such as interpretation of the instrument or other contractual issues);
2. Legal capacity of the mortgagee or trustee (such as whether the mortgage was assigned, the status of the mortgage holder, etc.);
3. An accounting to determine the amount owed or whether either a mortgagee or mortgagor were in default; and
4. Other matters, outside of the foreclosure sale record.

What is the foreclosure sale record? The statutes answer this question. The statutory procedures require that a notice of sale be published and posted (**MCL 600.3208**); that the sale be to the highest bidder and be held at the county courthouse as noticed (**MCL 600.3216**); after the sale the deputy sheriff must execute a deed and deliver it to the Register of Deeds within 20 days (**MCL 600.3232**), redemption must be paid to the purchaser or the Register of Deeds

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<sup>7</sup> The Court of Appeals suggests that the **Reid/Gage** limitation on defenses available in summary proceedings was abdicated by revisions to **MCL 600.8302**. The revised **MCL 600.8302** allows District Courts to consider equitable defenses. This amendment merely clarified whether the District Court has equitable jurisdiction in summary proceedings. Before the District Court (when **Reid** and **Gage** were decided), summary proceedings were conducted in the Circuit Courts which had equitable jurisdiction. Thus, the Circuit Courts had jurisdiction to hear challenges to foreclosures (equitable matters). This Court in **Reid** and **Gage** limited those challenges to matter of public record: the statutory foreclosure record. When the District Courts were established, many argued that the District Courts did not have any equitable power. If the Court of Appeals’ position is correct (i.e., any equitable defenses can be raised in summary proceedings to set aside a foreclosure), the Court of Appeals’ panels in the subsequent opinions in **Manufacturers Hanover** and **Zachary** would not have relied upon **Reid** and **Gage** to define and limit what defenses may be raised in summary proceedings. The statute indicates that whatever equitable defenses are available are within the District Court’s jurisdiction. The statute does not say what defenses are available. The decisions in **Reid** and **Gage** define what equitable defenses are available (i.e., irregularities in the statutory foreclosure proceedings). The Court’s panel in **Manufacturers Hanover** got it right: **Reid/Gage** are still valid and thus, (a) the Court had to first decide if the alleged foreclosure requirement was imposed by Michigan law and if so, (b) is it a defense to summary proceedings? The Court in **Manufacturers Hanover** determined that the alleged requirement at issue in that case was not imposed by Michigan law so it never addressed the second question. The Court of Appeals in the present case failed to answer either question but remanded for determination of any of Defendants’ equitable considerations without any guidance to the parties or District Court.

(MCL 600.3240 and MCL 600.3244) and affidavits may be recorded as a record of these requirements. (MCL 600.3256). It is this record that can be established by submitting the affidavits with the Sheriff's Deed. This is the record that the Supreme Court referred to in *Reid* and *Gage*.

To allow the occupants to raise defenses extrinsic to this record would place an impossible burden on potential bidders and discourage anyone from submitting bids. Potential bidders can determine whether the property was posted, whether publication occurred and whether the sale took place as noticed and whether the Sheriff Deputy sold the property to the highest bidder.

Potential bidders cannot determine whether the mortgagors actually defaulted, whether the mortgagee defaulted on its contractual obligations on the balance owing or whether the mortgage was properly accelerated. Privacy rules and potential liability of the mortgagee for disclosing private information to third parties keeps information like the notice of breach, prior payment information, etc. private between the mortgagee and mortgagor. One example of this obligation to maintain privacy is 15 USC 1692(c).<sup>8</sup> Potential bidders can only assess compliance with the record of statutory proceedings.

The Court of Appeals disregarded this longstanding precedent when it held that defendants in summary proceedings after mortgage foreclosures may consider *any* equitable claims. Thus, a defendant may wait until after a third-party purchases at a mortgage foreclosure sale and after the redemption period expires and then assert that foreclosure was inappropriate. The Court of Appeals decision would allow the Defendants to seek an accounting contrary to *Reid/Gage* from the original creditor. The Court of Appeals decision would allow a Defendant

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<sup>8</sup> Prohibiting communication of information about the mortgage loan account to third parties.

to raise an unjust enrichment claim based on a low bid contrary to *Carlisle v. Dunlap*, 203 Mich. 602 (1918).<sup>9</sup> If the purchaser waited 6 months to commence the summary proceedings, the Court of Appeals decision would allow the Defendants to assert laches as a defense to defeat foreclosure!

The Court of Appeals' decision is internally inconsistent. On page 4, the Court of Appeals states that "any equitable defense or counterclaim" may be brought in summary proceedings under **MCL 600.8302**. On page 6, the Court of Appeals indicates that the:

"district court had jurisdiction to consider defendants' equitable claims, if nothing else to determine whether they merited recognition such that the summary proceedings for procession were improper. The court could then have granted appropriate relief to permit resolution of the title claims, either by hearing the claims in District Court or dismissing or staying the possession action until the title claims were resolved in circuit court."

In between this quoted language (on page 5) the Court of Appeals holds that an equitable counterclaim to quiet title may not be heard in District Court. If the District Court has jurisdiction to hear all equitable defenses and counterclaims as suggested on pages 4 in 6, an equitable defense or counterclaim to quiet title would be within the jurisdiction of the District Court, not beyond its jurisdiction as stated on page 5! In so ruling, the Court of Appeals recognized that some equitable defenses or counterclaims may not be asserted in summary proceedings to defeat foreclosure. However, it failed to then follow this Court's rulings in *Reid* and *Gage*.

The Court of Appeals totally misunderstood Plaintiff's argument and the distinctions in defenses allowed by *Reid/Gage*. The Court of Appeals, at page 4 of its Opinion, stated that "Plaintiff argues that Michigan case law establishes that the defense of the invalidity of

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<sup>9</sup> None of this information is available to bidders at the foreclosure sale and thus, purchasers at foreclosure sales will have no way to know if they are wasting their money or bidding for good title.

foreclosure may not be raised in summary proceedings." The Court of Appeals then quotes a short section from *Federal National Mortgage Association v Wingate*, 404 Mich. 661, 676-677 (1979) which cites to *Gage* as controlling Michigan law.

This was not the Plaintiff's argument. As described above, Plaintiff's argument is that *Reid/Gage* set forth Michigan law. *Reid/Gage* allow challenges to foreclosure sales in summary proceedings but limit challenges to matters in the statutory foreclosure record. *Reid/Gage* prohibit challenges in foreclosure proceedings based on matters extrinsic to the foreclosure record (i.e., extrinsic to the statutory foreclosure process).

The errors committed by the Court of Appeals is of significance to the law of this state. With the multitude of foreclosure sales each week in this state and the need to have settled rules for real property titles, the conflict between prior case-law and the Court of Appeals' decision in this matter cannot be tolerated. Thus, this Court should grant leave to appeal in order to correct the Court of Appeals' errors.

### **III. Is the alleged lack of a contractual 30 day notice an irregularity in the statutory foreclosure procedures?**

The Court of Appeals stated at page 6 of its Opinion, that "there was evidence of significant procedural irregularities with respect to the default..." The Court of Appeals did not define what it means by a procedural irregularity with respect to default. Without some definition, the parties and District Court lack any guidance for a new trial. Further, there was no irregularity with respect to default. Defendants admit they were in default.

The only issue relating to the default raised by Defendants was their allegation that the foreclosing creditor allegedly failed to give them 30 days notice before publishing and posting the foreclosure. If the Court of Appeals refers to this issue as a significant procedural

irregularity, it cannot be a basis for challenging the foreclosure sale as it is outside of the statutory foreclosure record.

The 30 day notice is not required by statute. The notice in question is merely a contractual 30 day notice. The Defendants admit that they knew they were in default. The Defendants knew that the bank commenced the foreclosure proceedings. The Defendants did not assert any negative impact connected with the lack of a 30 day notice. The Defendants have never claimed that they could have cured the default if given the 30 day notice. The Defendants never attempted to contact the bank about the foreclosure. Defendants never brought suit to enjoin the foreclosure before the sale or during the redemption period. Instead, they sought to refinance with an independent third-party mortgage company and redeem.

Even if this is notice was a procedural irregularity available as a defense, the Defendants must establish that the irregularity impacted their rights in the foreclosure process. Absent a negative impact, the sale cannot be voided. *Jackson Inv. Corp. v Pittsfield Products, Inc.*, 162 Mich.App. 750 (1987).

Since they do not claim that they could have cured the default before foreclosure, the lack of a 30 day notice does not impact their rights to redeem and since they were aware of their rights to redeem, this asserted irregularity had no impact on the foreclosure process and is not grounds to set aside the sale. Thus, it is not a defense that can be used in this matter.

If this Court allows the Court of Appeals' decision to stand, the District Courts will be required to disregard the published precedent of *Reid and Gage* cited above, and *Jackson Inv. Corp. v. Pittsfield Products, Inc.*, 162 Mich. App. 750 (1987) (irregularity must impact foreclosure process to affect sale)

#### **IV. Must a mortgagor's assignee/grantee be named in the notice of sale required by MCL 600.3212?**

The Court of Appeals states that "There was evidence of significant procedural irregularities with respect to the ... foreclosure..." Again, the Court of Appeals does not indicate what irregularities they believe existed with respect to the foreclosure. The only irregularities raised by Defendants was that the notice of sale did not include their name.

The Court of Appeals never addressed what the statutory requirements are for notices of sale under the statute. The statute, **MCL 600.3212**, is very clear on its requirements. The notice must list the "names of the mortgagor, the original mortgagee, and the foreclosing assignee, if any."

The statute does not require the name of and as any of the mortgagor or anyone else who acquires an interest in the property from the mortgagor. Thus, it is not a procedural irregularity to not name the Defendants, assignees or grantees of the mortgagor, in the notice.

The Court of Appeals' decision is contrary to **Michigan Land Title Standards 16.22**. (Exhibit 14). The standard clearly states that the notice of sale only needs to include those matters required by the statute. Example C is directly on point indicating that the name of a mortgagor's grantee need not be included. See also, *Robulus v American State Bank*, 258 Mich. 21 (1932) (where the statute only requires posting and publication, the creditor need only follow the statutory requirements and the Court will not impose additional requirements).

While the standards are not binding precedent, they represent the Michigan Bar Association's Real Property Law Section's understanding of clear Michigan law. As indicated in the introductory comments, the Real Property Law Section's committee disregards anything remotely disputable. Thus, the multitude of attorneys involved in the process of adopting the

Land Title Standards over the last 50 years state a different result than implied by the Court of Appeals.

If this Court allows the Court of Appeals decision to stand, the parties and the District Court will not have any direction on how to deal with the statutory notice requirement upon re-trial of this matter. Further, other litigants will cite to the ambiguity of the Court of Appeals' decision and raise arguments concerning the content of notices based on matters outside of the statutory requirements.

This Court should grant Plaintiff leave to appeal the Court of Appeals' decision.

**V. May a property owner challenge a foreclosure sale based on his agents' failure to redeem the property from foreclosure?**

The Court of Appeals stated that "There was evidence of significant procedural irregularities with respect to redemption." The Court of Appeals does not specify the irregularities concerning redemption, although the Court did state that: "there was evidence to support defendants' claim that they believed the home to be redeemed following their refinancing."

The Court of Appeals was referring to the fact that the Defendants went to an independent third-party mortgage company in efforts to refinance and redeem the property from foreclosure. The third-party mortgage company allegedly sent a payment to Washington Mutual, the agent for the foreclosing creditor. The refinancing allegedly occurred after the foreclosure sale.

It was clear from the testimony at trial, and Defendants do not contest that no redemption payment was paid to the Register of Deeds. Further, no redemption payment was tendered to Plaintiff. Defendant merely claims that a payment was tendered to Washington Mutual, agent

for Comerica Bank. There was no evidence to suggest, and Defendants do not claim, that Comerica Bank and Washington Mutual were agents of, or otherwise connected to, the Plaintiff.

Based on the above, it is undisputed that the alleged redemption payment was tendered to the wrong party and not to the only parties designated by statute. Redemption payments may only be paid to the Register of Deeds or the purchaser. **MCL 600.3240** provides, in pertinent part, that:

“(1) A purchaser's deed is void if the mortgagor, the mortgagor's heirs, executors, or administrators, or any person lawfully claiming under the mortgagor, the mortgagor's heirs, executors, or administrators redeems the entire premises sold by paying the amount required under subsection (2), within the applicable time limit prescribed in subsections (7) to (12), to the purchaser, the purchaser's executors, administrators, or assigns, or to the register of deeds in whose office the deed is deposited for the benefit of the purchaser.”<sup>10</sup>

Further, **MCL 600.3236** provides that failure to redeem under **MCL 600.3240** makes the deed operative.

If the Court of Appeals decision is allowed to stand, Michigan law will be that if a property owner "believes" he redeemed from the foreclosure sale, the redemption the period extended for unknown time. This is directly contrary to **MCL 600.3240** and **MCL 600.3236**. It is also contrary to well-established Michigan case-law that gives effect to the plain meaning of these statutes.

In *Schulthies v Barron*, 16 Mich. App. 246 (1969), the Court of Appeals ruled that courts are not at liberty to rewrite the redemption deadlines imposed by statute. In that case, the Court addressed a situation where the property owner was mistaken over the redemption deadline. The debtor “believed” he had 12 months to redeem but only had 6 months. The Court rejected the debtor’s request for an equitable extension stating that:

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<sup>10</sup> This section was amended in 2004 to allow redemption payment only to the purchaser. 2004 Mich. Legis. Serv. P.A. 538 (S.B. 929) (WEST).



“Although the trial court found that the price paid at foreclosure sale was well below the worth of the property, the need for certainty in such sales is, under present law, compelling. The purpose of posted notice is to inform the mortgagor so that he may see that a price adequate to protect his interests is obtained at the sale. The plaintiff did not do this. That she did not understand the nature of the posted notice is no defense.”

“This Court cannot amend the statutory redemption provisions of the State of Michigan by extending the doctrine of fraud and irregularity to include mistake as a third exception in statutory foreclosure.” **16 Mich. App. at 248.**

In *Cameron v. Adams*, **31 Mich. 426 (1875)** this Court indicated that it could not allow a late redemption even though (a) the property owner paid part of the redemption amount during the redemption period and (b) the property owner did not complete the redemption based on physical or mental disorder. In deciding the case, this Court concluded that:

“The inadequacy of price cannot vitiate such a sale, if otherwise fair and regular. The owner of the right of redemption can always redeem within the year by refunding the amount paid, with interest at the rate fixed by the statute. It is only his failure to do this which has been the cause of his loss.”

"The case is one of much hardship, and it is much to be regretted that the complainants have been deprived of their estate by the rigorous effect of provisions which take no account of misfortunes. But courts of equity cannot assume any censorship to condemn parties for doing what the courts cannot prevent. *They can only redress wrongs within their jurisdiction.*" **31 Mich. 426 (Emphasis supplied).**

In *Carlisle* this Court rejected efforts to extend the redemption period stating that:

“Repeating the language of Mr. Justice Campbell:”

“Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. \* \* \* “

“The case is one of much hardship, and it is much to be regretted that the complainants have been deprived of their estate by the rigorous effect of provisions which take no account of misfortunes. But courts of equity cannot assume any censorship to condemn parties for doing what the courts cannot prevent. They can only redress wrongs within their jurisdiction.’

The decree must be affirmed, with costs to appellees.” **203 Mich. 602 at 608.**

In *Detroit Trust Co. v. George*, 262 Mich. 362 (1933), this Court ruled that it cannot extend the redemption period where the foreclosed property was subject to condemnation and the property owner wanted to use part of the condemnation proceeds to redeem the property from foreclosure.

In *Flynn v. Korneffel*, 451 Mich. 186 (1996), this Court ruled that placing the funds in escrow (much like paying the wrong party) prior to expiration of the redemption period is not sufficient to allow the courts to rewrite the statutory rules on redemption.

The only times where the Courts have allowed a late redemption are situations where there were errors in conducting the sale or by the party entitled to redeem. Neither situation is present in this case. For example, in the unpublished case of *Hodge v. Ulmer*, 1997 WL 33343877, \*1 (Mich.App.) (Mich.App.,1997) (Exhibit 15) the Court allowed an extended redemption. Because the defendant purchaser interfered with refinancing. In the unpublished case of *Gaber v. Otsego County Register of Deeds*, 2000 WL 33519539, \*1 (Mich.App.) (Mich.App.,2000) (Exhibit 16), the Register of Deeds inadvertently provided the property owner with the wrong amount needed to redeem. In this line of cases, the redemption period is extended only because the parties entitled to receive the redemption payment caused problems with redemption.

In the present case, there was no conduct by the Register of Deeds or the Plaintiff purchaser that interfered with redemption. To the contrary, there was absolutely no contact with the Register of Deeds or the Plaintiff.

Despite this well-established precedent, the Court of Appeals disregards these opinions which held that the Court does not have jurisdiction to re-write the redemption rules and holds that a defendant's "belief" that redemption occurred (a belief not resulting from any contact with

the Register of Deeds or the purchaser) is sufficient to allow the Courts to re-write the statutory redemption rules.

To allow this Court of Appeals' opinion to stand undermines the certainty of all of the case-law preceding it dealing with foreclosure and redemption rights. To allow the Court of Appeals opinion to stand conflicts with clear statutory provisions on redemption. The Court of Appeals opinion to stand, murky is the water dealing with foreclosures and real property titles. Thus, this Court should grant leave to appeal.

**VI. The Court of Appeals' disregarded the requirement that any irregularities have an impact on the foreclosure sale process to be relevant.**

Even if the above alleged lack of a 30 day contractual notice and the fact that Defendants are not listed on the Notice of Sale are irregularities, they are not sufficient to set aside the foreclosure sale and serve as a defense to eviction unless the alleged irregularities negatively impact the Defendants' ability to protect their interest in the foreclosure proceedings. *Jackson Investment Corp. v Pittsfield Products, Inc.*, 162 Mich. App. 750 (1987).

Assuming that the mortgage creditor failed to give a 30 day notice and assuming it is not an irregularity in the foreclosure proceedings, it did not negatively impact the Defendants. Defendants have presented no claim that the failure negatively impacted them. They still knew about the foreclosure sale in July 2001 when the notice was posted. They still had rights to cure the default up until 5 days before the foreclosure sale on August 23, 2001, as stated in the mortgage document. They do not claim that they could have cured the default. Instead of trying to cure the default, they proceeded to attempt a refinancing. The alleged lack of a 30 day notice did not affect the refinancing.

If the failure to list Defendants' names in the notice of sale was an irregularity, did it impact the Defendants? The Defendants knew of the foreclosure proceedings as admitted by Mr. DeVries. They knew of the proceedings in July, 2001, over one month before the foreclosure sale. They knew enough about the proceedings to seek a refinancing with a third-party independent mortgage company. Everything else about the sale process was regular and the Defendants do not claim any other irregularities. The notice did not stop them from closing on refinancing. Thus, the lack of their own name, if an irregularity, did not negatively impact them.

The Court of Appeals refers to irregularities in the redemption process. The Court of Appeals refers to no specific irregularities but must mean the fact that the Defendants and their agents did not tender payment to the correct parties. This is not an irregularity that could justify extending the redemption deadline.

The bottom line is that the Court of Appeals saw the amount bid at the foreclosure sale and did not want to cause the Defendants to lose the property by failure to properly redeem.

***Carlisle v. Dunlap*, 203 Mich. 602 at 608 (1918).** This is not a basis for ignoring the redemption rules. The Defendants had the same redemption rights as every other mortgagor and every other assignee in any other foreclosure process in this state. In fact, the redemption period for this foreclosure is the longest period set forth by statute, 12 months as opposed to the normal 6 month period (because of the low balance).<sup>11</sup>

The Court of Appeals sought to justify its decision by indicating that "anyone bidding on this property would surmise something was amiss under these circumstances, and, consequently, plaintiff's public policy argument fails." How can someone know that there is some irregularity with the mortgage account merely based on the mortgage account balance?

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<sup>11</sup> A low bid actually benefits to a property owner: the lower the bid price, the less they must pay to redeem.

The Defendants knew of the foreclosure sale scheduled for August 23, the Defendants knew they had a redemption deadline and the Defendants do not claim that the Plaintiff purchaser or the Register of Deeds did anything to inhibit their redemption rights. They do not claim anything happened at or after the foreclosure sale that inhibited their redemption rights.

If a party cannot extend the redemption deadline because of their mistake over the deadline, because they became ill and could not redeem, because they put the proceeds in escrow, or any of the other multitude of reasons rejected by the Courts; there is no basis to throw out the statutory redemption deadline and procedures in this case.

To allow the Court of Appeals' decision to stand disregards the ***Jackson Investment*** published opinion and disregards the statutes and this Court's prior case law which provide for certainty in the rules for redemption. The Court of Appeals muddies the waters and allows Defendants to raise any equitable considerations after the redemption period has expired in efforts to thwart the foreclosure. Such a result is directly in conflict with this Court's prior case law.

## CONCLUSION

Plaintiff requests that this Court grant it leave to appeal to this Court from the Court of Appeals' decision. Plaintiff seeks to rectify the Court of Appeals' failure to follow the statutes and established case law precedent dealing with foreclosure which leaves the status of foreclosure sales and resulting real property titles unpredictable.

Dated: January 19, 2005

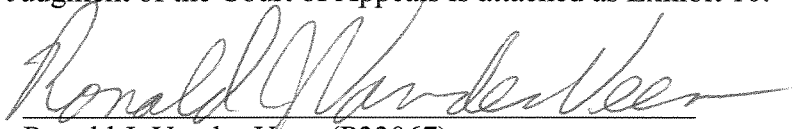


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**OPINIONS AND JUDGMENTS OF THE LOWER COURTS  
INCLUDING THE COURT OF APPEALS**

The Judgment of the District Court awarding possession to Plaintiff after a jury trial is attached as Exhibit 8. The Opinion/Judgment of the Circuit Court affirming the District Court is attached as Exhibit 9. The Opinion/Judgment of the Court of Appeals is attached as Exhibit 10.

Dated: January 19, 2005

  
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